

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID R. HEARN

Claimant

VS.

JAY HATFIELD CERTIFIED USED CARS

Respondent

AND

KANSAS AUTOMOBILE DEALER WORKERS COMPENSATION FUND

Insurance Fund

Docket No. 1,035,667

ORDER

Claimant appealed the October 25, 2007, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

Claimant alleges he injured his right shoulder while working for respondent on May 26, 2007, when his back gave out and he grabbed a pole to avoid falling. In the October 25, 2007, Order, Judge Hursh found claimant had failed to prove his accident arose out of his employment with respondent. The Judge also found claimant failed to prove he sustained any injury as a result of the May 26, 2007, incident. Consequently, Judge Hursh denied claimant's request for workers compensation benefits.

Claimant, who is a car salesman, contends he was walking across respondent's lot when his back gave out and, therefore, his accident is compensable under the Workers Compensation Act. Claimant's argument may be summarized, as follows:

The Claimant sustained personal injury by accident on or about May 26, 2007. On that date, Claimant testified he was walking on the parking lot at the used car/mobility center of Respondent where Claimant works as a car salesman. Claimant testified that being on the lot was part of his job duties with Respondent. Claimant testified that he had turned to come inside when his back gave out causing him to fall backwards. It should be noted the Claimant has an ongoing workers' compensation claim with the Respondent regarding his back. Claimant

testified he grabbed onto a pole to break his fall and, in doing so, caused injury to his right shoulder. Claimant testified his fall was witnessed by Jerry Spencer, the mobility manager.¹

Accordingly, claimant requests the Board to reverse the October 25, 2007, Order.

Conversely, respondent and its insurance fund contend the Order should be affirmed. They argue claimant failed to prove that he injured his shoulder as alleged and also failed to prove the alleged accident arose out of his employment.

The only issue before the Board on this appeal is whether claimant injured his right shoulder in an accident that arose out of his employment with respondent.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member finds:

In another workers compensation claim, claimant alleges he injured his back in January 2005 while working for respondent. But in this proceeding, claimant alleges he injured his right shoulder at work on May 26, 2007, when he grabbed a pole to avoid falling after his back gave out due to his earlier back injury. Claimant testified his injury occurred, as follows:

I was outside [in respondent's lot] and I turned and to come back inside the building, and whenever I turned, my back gave out and I fell backwards. And I grabbed ahold of a telephone pole, a light pole, and it -- I pulled backwards and that's whenever --²

According to claimant, following his back injury he has fallen numerous times, but this was the first time he sustained injury as a result of one of those falls.

At his attorney's request, in early August 2007 claimant was examined by Dr. Edward J. Prostic. According to the doctor's medical report, claimant reported he had fallen several times and had injured his right shoulder in one of those falls. The doctor concluded his report with the observation that claimant's back symptoms were typical of spinal stenosis and "treatment is also possible for his shoulders." The doctor wrote, in part:

¹ Claimant's Brief at 1 (filed Nov. 26, 2007).

² P.H. Trans. at 8.

It continues to be my opinion that on or about January 6, 2005, David R. Hearn sustained injuries during the course of his employment. He has had poor response to surgeries about his elbow and low back. His continuing lumbar symptoms are typical for spinal stenosis. This was not proven by his post-operative MRI. Consideration should be given to myelography to see if there is residual spinal stenosis that can be alleviated. Additional treatment is also possible for his shoulders. The patient has marginal ability to return to any gainful employment.³

CONCLUSIONS OF LAW

Only those accidents that arise out of and in the course of employment are compensable under the Workers Compensation Act.⁴ Before an accident arises out of employment, there must be a causal connection between the accident and the nature, conditions, obligations, or incidents of the employment.⁵

This court has had occasion many times to consider the phrase “out of” the employment, and has stated that it points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. . . .

This general rule has been elaborated to the effect that an injury arises “out of” employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.

An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment. . . . [T]he foregoing tests exclude an injury not fairly traceable to the employment and not coming from a hazard to which the workman would have been equally exposed apart from the employment.⁶

As indicated above, claimant has initiated an earlier claim against respondent for a January 2005 back injury. But the issue in this appeal is whether claimant’s May 26, 2007, accident, standing alone, arose out of and in the course of his employment with respondent. The issue is not whether the May 26, 2007, accident was a natural and direct consequence of the January 2005 back injury.

³ P.H. Trans., Cl. Ex. 2 at 2.

⁴ See K.S.A. 44-501.

⁵ See *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

⁶ *Siebert v. Hoch*, 199 Kan. 299, 303-304, 428 P.2d 825 (1967) (citations omitted).

Accordingly, the undersigned Board Member agrees with Judge Hursh that claimant has failed to prove his May 26, 2007, accident arose out of his employment with respondent. The greater weight of the evidence at this juncture indicates the alleged May 26, 2007, accident occurred as the result of his back giving out rather than as a result of any condition, obligation or incident of his job.

Whether an accident is related to the nature, conditions, obligations or incidents of employment is a question of fact to be decided on a case-by-case basis. And at this juncture, there is a lack of evidence establishing the May 26, 2007, accident arose out of claimant's employment. The mere fact that a worker is on his or her employer's premises at the time of an alleged injury is not sufficient.

Accordingly, the undersigned affirms the denial of benefits in this claim. Should claimant contend he is entitled to receive workers compensation benefits because his back gave out on May 26, 2007, due to his earlier work-related injury, he should request those benefits in the earlier back claim.

WHEREFORE, the undersigned Board Member affirms the October 25, 2007, Order entered by Judge Hursh.

IT IS SO ORDERED.

Dated this ____ day of January, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Fund
Kenneth J. Hursh, Administrative Law Judge